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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

IN THE MATTER OF:

RADICAL BUNNY, L.L.C., an Arizona limited liability company,

HORIZON PARTNERS, L.L.C., an Arizona limited liability company,

TOM HIRSCH (aka TOMAS N. HIRSCH) and DIANE ROSE HIRSCH, husband and wife,

BERTA FRIEDMAN WALDER (aka BUNNY WALDER), a married person,

HOWARD EVAN WALDER, a married person,

HARISH PANNALAL SHAH and MADHAVI H. SHAH, husband and wife,

Respondents.

DOCKET NO. S-20660A-09-0107

PROCEDURAL ORDER DENYING MOTION FOR SUMMARY JUDGMENT AND SETTING NEW HEARING DATE

BY THE COMMISSION:

On March 12, 2009, the Securities Division ("Division") of the Arizona Corporation Commission ("Commission") filed a Notice of Opportunity for Hearing against Radical Bunny, L.L.C., Horizon Partners, L.L.C., Tom Hirsch (aka Tomas N. Hirsch), Berta Friedman Walder (aka Bunny Walder), Howard Evan Walder, Harish Pannalal Shah, and Madhavi H. Shah "(Notice"), in which the Division alleged multiple violations of the Arizona Securities Act in connection with the offer and sale of securities in the form of notes and investment contracts.

On March 26, 2009, a request for hearing was filed on behalf of Horizon Partners, L.L.C., Tom Hirsch, Diane Rose Hirsch, Berta Friedman Walder, Howard Evan Walder, Harish Pannalal Shah and Madhavi H. Shah ("Respondents"). The request for hearing requested a hearing date after April 22, 2009.

On April 9, 2009, by Procedural Order, a procedural conference was scheduled for May 8, 2009.

On May 6, 2009, Respondents filed a Request to Continue the May 8, 2009, procedural conference. The Request indicated that Respondents' counsel and counsel for the Division had agreed to several dates for resetting the date of the procedural conference.

By Procedural Order issued May 7, 2009, the procedural conference was rescheduled for June 16, 2009.

The procedural conference was held as scheduled and procedural dates were established for the Securities Division to provide exhibits and list of witnesses, and for a subsequent procedural conference.

On August 18, 2009, the Division filed a Stipulation to Continue the Procedural Conference Scheduled for September 3, 2009, requesting a 30 day continuance.

On August 24, 2009, by Procedural Order, the procedural conference was rescheduled to be held on October 7, 2009.

On October 6, 2009, Respondents filed in the Commission's Tucson office, a Request to Continue the October 7, 2009 Procedural Conference, indicating that additional time was needed to review documents provided by the Securities Division.

By Procedural Order issued October 6, 2009, the procedural conference was rescheduled for November 3, 2009.

On November 3, 2009, the procedural conference was held to discuss procedural issues, including hearing dates. The Securities Division estimated that at least 25 days of hearing would be required for this case. The parties were encouraged to engage in discussions to see whether a settlement could be reached in this case, and it was agreed that a date for hearing should be established.

On November 3, 2009, a Procedural Order was issued scheduling the hearing to commence on March 8, 2010.

On February 8, 2010, Respondents filed a Motion for Continuance and a Stipulation and Motion for Substitution of Counsel.

On February 10, 2010, the Division filed its Response to the Motion for Substitution of Counsel and its Response to the Motion for Continuance.

On February 18, 2010, Respondents filed their Reply on the Motion for Continuance and also filed another Stipulation and Motion for Substitution of Counsel.

On February 19, 2010, the Division filed its Response to Stipulation and Motion for Substitution of Counsel, indicating no objection.

On February 26, 2010, by Procedural Order, the hearing was continued from March 8, 2010 to June 2, 2010.

On April 28, 2010, the Commission issued Decision No. 71682, a Consent Order against Respondent Radical Bunny, L.L.C., an Arizona limited liability company.

On April 30, 2010, a Motion of Summary Judgment or to Dismiss (Oral Argument Requested) ("Motion"); a Statement of Facts; and a Declaration of Tom Hirsch were filed on behalf of the Respondents.

On May 10, 2010, the Division filed its Response to the Motion.

By Procedural Order issued May 19, 2010, oral argument on the Motion was scheduled to be held during the May 25, 2010 Procedural Conference.

On May 20, 2010, the Respondents filed their Reply on Motion for Summary Judgment.

The May 25, 2010 Procedural Conference was held as scheduled and oral argument was heard on the Motion. The Motion was taken under advisement, and in order to allow the parties additional time to engage in discussions concerning additional stipulations or a possible consent order, and due to the press of the Commission's other business and availability of the hearing room, and pending resolution of the Motion, the June 2, 2010 hearing date was vacated.

On May 27, 2010, the Division filed a Notice of Availability for Administrative Hearing and on July 13, 2010, the Division filed a Motion to Set Procedural (Status) Conference.

Motion for Summary Judgment or to Dismiss

Respondents' Motion requested that the Commission either dismiss or grant summary judgment on all claims related to securities fraud.

The Commission's Rules of Practice and Procedure ("Rules of Practice and Procedure"),

contained in Title 14, Chapter 3 of the Arizona Administrative Code ("A.A.C."), govern actions that are within the jurisdiction of the Commission. A.A.C. R14-3-101(A) provides that in "all cases in which procedure is set forth neither by law, nor by these rules, nor by regulations or orders of the Commission," the Arizona Rules of Civil Procedure are to be followed. The Rules of Practice and Procedure have no specific rule on motions to dismiss or for summary judgment, but A.A.C. R14-3-106(K) requires that motions "conform insofar as practicable" to the Arizona Rules of Civil Procedure. While the rule does not address specific types of motions, and therefore does not set forth a standard speaking precisely to summary judgment or a motion to dismiss, a plain reading of the rule indicates that the legal standard is what is provided in the Arizona Rules of Civil Procedure.[1]

Ariz. R. Civ. P. Rule 12(b) provides that with a motion to dismiss accompanied by matters outside the pleading and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. The Respondents' Motion was accompanied by an affidavit of Tom Hirsch ("Hirsch Affidavit") which contains several statements concerning matters within the complaint and answer. The Hirsch Affidavit also provides more detail than contained in the pleadings and at times, the statements vary from the pleadings in terms of describing matters such as the semiannual meetings of Radical Bunny and the various financial issues in the case. Exhibit A, attached to the Hirsch Affidavit, consists of two samples of Radical Bunny's "Direction to Purchase" documents discussed in the affidavit. The Hirsch Affidavit and the attached Exhibit were docketed and no motion to exclude them from the record has been filed by the Division. Pursuant to Rule 12(b), the motion to dismiss should be treated as one for summary judgment. Also, during oral argument, the parties did not distinguish between a motion to dismiss and a motion for summary judgment, but instead debated specifics on summary judgment. Accordingly, the Motion will be treated as a motion for summary judgment.

Rule 56(c) of the Arizona Rules of Civil Procedure states that summary judgment may be ordered "if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

[1] The Commission has issued decisions in which motions for summary judgment were determined under the standards of Rule 56. *See, e.g., Roger Chantel v. Mohave Electric Cooperative*, 2006 WL 1559771 at * 6 (Ariz. C.C. 2006) (applying Arizona Rule of Civil Procedure 56 as interpreted in *Orme School v. Reeves*, 166 Ariz. 301 (1990)).

party is entitled to a judgment as a matter of law." Arizona case law has established that "the entire record" is to be examined in evaluating a motion for summary judgment.[2]

In *Orme School v. Reeves*, 166 Ariz. 301 (1990), the Arizona Supreme Court established the Arizona standard for summary judgment in light of changes adopted by the U.S. Supreme Court. The *Orme* Court held that, although a trial judge considering a motion for summary judgment must evaluate the evidence to some extent, the standard to be applied is the same as that used for a directed verdict: "Either motion should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense."[3] The Court went on to clarify that it was not altering the traditional rule that while a court may not grant summary judgment if the standard is not met, it can deny summary judgment even when there does not appear to be a genuine dispute over any material fact.[4] The Court also explained that the non-movant's evidence is to be believed and that all justifiable inferences are to be drawn in the non-movant's favor.[5] Finally, the Court explained that a motion for summary judgment should be granted if the party with the burden of proof on a claim or defense cannot show, in response to the movant's assertion that there is no evidence to support an essential element of the claim or defense, that there is evidence creating a genuine issue of fact on the element in question.[6]

Applying this legal standard in this action, the Motion cannot be granted unless no genuine issue of material fact is present and judgment as a matter of law is warranted for the party filing the motion.[7] Thus, it is necessary to evaluate the claims made in the motion for summary judgment and to determine whether, given the standard of law and the evidence involved, no genuine issue of material fact exists and whether judgment should be granted as a matter of law. Summary judgment is also warranted "where the facts are settled and a pure question of law is presented."[8] This is

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[2] See *Chanay v. Chittenden*, 115 Ariz. 32, 37 (1977) (citing *Krumtum v. Burton*, 111 Ariz. 448 (1975); *Stevens v. Anderson*, 75 Ariz. 331 (1953)).
[3] *Orme*, 166 Ariz. at 309.
[4] *Id.*
[5] *Id.* at 309-10.
[6] *Id.* at 310.
[7] *Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 212 Ariz. 381, 385 (2006) ; *Orme School v. Reeves*, 166 Ariz. 301 (1990).
[8] *Midland Risk Management Co. v. Watford*, 179 Ariz. 168, 170 (1994).

significant in that the question of whether a security exists is a question of law,[9] and there is dispute among the parties in this case in terms of the validity and application of the relevant law.

Existence of Material Issues of Fact and Law

The Respondents argue that the "participations" involved in this case were in the form of interests in notes issued by Mortgages Ltd. and therefore not securities. According to the Motion, "[a]ll of the money was for construction, not financing for a business. The notes were for a fixed percentage amount, were not premised on someone else's profit and the purchases did not result from solicitations."[10] The Respondents characterize their actions as acting as an "agent" for Mortgages Ltd., who was registered to sell securities.[11] Relying upon *AMFAC Mortgage Corporation v. Arizona Mall of Tempe, Inc.,* 583 F.2d 426 (9th Cir.1978) as support for their legal analysis, they argue that under *AMFAC*, notes intended to raise funds for construction projects are not securities under the fraud provision of the State or Federal Securities Acts."[12]

The Division argues that the investments that it alleges are securities are not the interests in the notes collateralized by deeds of trust sold by Mortgages Ltd. nor the loans that were advanced by Radical Bunny directly to Mortgages Ltd. ("RB-MLtd Loan(s)"), but the three investment opportunities: limited liability company membership interests in Horizon Partners; limited liability company membership interests in Radical Bunny; and loans from investors to Radical Bunny where the proceeds were pooled and then used by Radical Bunny to fund the RB-MLtd Loans ("RB-Participant Loan Program"). The Division alleges that these were investment contracts, and therefore, securities. The seminal case on the subject of whether an investment contract exists is the U.S. Supreme Court decision of *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946), adopted as law in Arizona in the case of *Rose v. Dobras*, 128 Ariz. 209 (Ct. App. Div.2 1981). Three elements comprise the test for an investment contract: "(1) individuals are led to invest money (2) in a common enterprise (3) with the expectation that they will earn a profit solely through the efforts of others."[13] The Division demonstrated how it believes the facts show that the three elements of an investment

[9] *Siporin v. Carrington*, 200 Ariz. 97, 100 (Ct. App. Div.1 2001).
[10] Motion at 2.
[11] May 25, 2010, Oral Argument, Tr. at 10.
[12] Motion at 7.
[13] *Rose*, 128 Ariz. at 211.

contract are met with regard to the limited liability membership interests and the RB-Participant Loan Program agreements.

The Division argues that even if the instruments were found to be notes, they would be securities under the applicable law. The Division contends that the law that must be applied in the context of fraud accusations is found in *MacCollum v. Perkinson*, 185 Ariz. 179 (Ct. App. Div.1 1996) which adopts the U.S. Supreme Court case of *Reves v. Ernst & Young*, 494 U.S. 56 (1990) as the standard for when a note is a security under the fraud provisions of the Act. Respondents essentially contend that *MacCollum* did not reject the finding in *AMFAC* that notes used for funding construction are not securities; rather, Respondents claim, it merely distinguished *AMFAC* because commercial notes were not at issue in *MacCollum*.

According to the Division, given that the definition of a security under the Act includes "any note," a presumption is made even in the fraud context that a note qualifies as a security.[14] Rebuttal of this presumption requires "a showing that the note bears a strong resemblance (in terms of the four factors identified in *Reves*) to an item on the judicially crafted list of instruments that were not intended to be regulated as a security."[15] Thus, courts look to four factors in determining whether a note is sufficiently similar to non-security notes such as "consumer financing notes, notes secured by a home mortgage," and various others.[16] The first factor is the parties' motivations; second, one looks to "the plan of distribution of the instrument to determine if it is [one] in which there is common trading or speculation"; third, one examines the reasonable expectations of the public; finally, it is determined whether there are risk-reducing factors (other applicable regulations, for instance) that negate the need to apply the Act.[17] In applying the *Reves* factors in this matter, the parties differ in their views as to whether the facts satisfy the test. Many of the differences amount to genuine issues of fact.

Conclusion

The Division and the Respondent disagree as to the characterization of the

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[14] *MacCollum*, 185 Ariz. at 187.
[15] *Id.*
[16] *Id.* (quoting *Tober*, 173 Ariz. at 212 n. 3).
[17] *MacCollum*, 185 Ariz. at 187-88.

instruments/investments in question as well as in the roles of participants/investors and others. The key question appears to be in what entity were the funds invested – in Radical Bunny and Horizon Partners as the Division alleges, or in Mortgages Ltd., as the Respondents allege. The Division has presented materials sufficient to make a plausible claim that the instruments are properly characterized as securities, either as investment contracts or as notes. There are clearly questions of material fact upon which there is no agreement.

There is also a dispute as to the law to be applied to the facts of this matter. The Division argues that the case law relied upon by Respondents is "dead law" in Arizona[18] and that the statutory support found in A.R.S. § 44-1843(A)(8) is misplaced. There are clearly legal issues in dispute, and resolution of the correct legal analysis to be applied in this matter is dependent upon resolution of the factual issues.

The Division has presented sufficient legal and factual disputes such that it would be improper to enter a judgment as a matter of law in favor of Respondents.

Accordingly, the Motion should be denied and the hearing should be rescheduled.

IT IS THEREFORE ORDERED that the Motion is denied.

IT IS FURTHER ORDERED that the **hearing** shall commence on **October 14, 2010 at 10:00 a.m.,** or as soon thereafter as is practicable at the Commission's offices, 1200 West Washington Street, Hearing Room 1, Phoenix, Arizona.

IT IS FURTHER ORDERED that the parties shall set aside **October 15, 18, 21, 22, 25, 26 27, 28, 29, and November 1, 2, 3, 4, and 5, 2010** for **additional days of hearing,** if necessary.

IT IS FURTHER ORDERED that a **prehearing conference** shall be held on **October 13, 2010 at 10:00 a.m.,** or as soon thereafter as is practicable at the Commission's offices, 1200 West Washington Street, Hearing Room 1, Phoenix, Arizona.

IT IS FURTHER ORDERED that the **Division** shall provide the Respondents copies of its **most current Witness List** and copies of **any additional Exhibits by October 6, 2010,** with courtesy copies provided to the presiding Administrative Law Judge.

[18] Tr. at 13.

IT IS FURTHER ORDERED that the **Respondents** shall provide the Division with copies of their **most current Witness Lists** and copies of **any additional Exhibits by October 6, 2010,** with courtesy copies provided to the presiding Administrative Law Judge.

IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113-Unauthorized Communications) applies to this proceeding as the matter is now set for public hearing.

IT IS FURTHER ORDERED that withdrawal or representation must be made in compliance with A.A.C. R14-3-104(E) and Rule 1.16 of the Rules of Professional Conduct (under Rule 42 of the Rules of the Arizona Supreme Court). Representation before the Commission includes appearances at all hearings and procedural conferences, as well as all Open Meetings for which the matter is scheduled for discussion, unless counsel has previously been granted permission to withdraw by the Administrative Law Judge or the Commission.

IT IS FURTHER ORDERED that all parties must comply with Rules 31 and 38 of the Rules of the Arizona Supreme Court and A.R.S. § 40-243 with respect to practice of law and admission *pro hac vice*.

IT IS FURTHER ORDERED that the Presiding Officer may rescind, alter, amend, or waive any portion of this Procedural Order either by subsequent Procedural Order or by ruling at hearing.

DATED this 2nd day of August, 2010.

LYN FARMER
CHIEF ADMINISTRATIVE LAW JUDGE

Copies of the foregoing mailed/delivered
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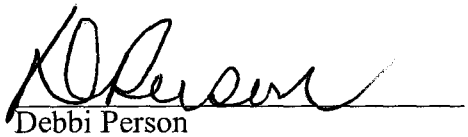
By: 
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